

Date: February 11, 1998

Case No.: 96-INA-00244

In the Matter of:

BREITBURN ENERGY CORPORATION,
Employer

On Behalf Of:

ANTONIA R. ASSANG,
Alien

Appearance: Hiram W. Kwan, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 11, 1994, BreitBurn Energy Corporation ("Employer") filed an application for labor certification to enable Antonia Rose Assang ("Alien") to fill the position of Production Analyst (AF 30-31). The job duties for the position are:

Responsible for monitoring oil and gas production; maintain production database; gather and analyze data and information for production plan and budget; preference cost analysis, inventory and expenses control and economic evaluation of prospective projects and acquisition. Must be familiar with statistical analysis, inventory control, mathematics program and decision analysis.

The only requirement for the position is a Master's Degree in Operation Research or a related field. The Employer did not require any experience in the job duties.

The CO issued a Notice of Findings on July 6, 1995 (AF 26-29), proposing to deny certification on several grounds. First, the CO questioned whether a *bona fide* job opportunity exists. Second, the CO found that the job opportunity, as described on the ETA 750, appeared to be tailored to the Alien's qualifications. Therefore, the CO instructed the Employer to document that it is not now feasible to hire an individual with less than the requirements listed and that the requirements are not tailored to meet the Alien's qualifications. Finally, the CO found that the Employer failed to establish that all U.S. applicants were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until August 10, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated July 28, 1995 (AF 18-22), the Employer contended that the job opportunity was not created for the Alien. The Employer explained that the opening resulted from the growth of the Company which has 25 permanent employees. In addition, the Employer asserted that the job requirements were not tailored to the Alien's qualifications. The Employer explained the relevance of each job requirement and stated that it is unwilling to hire an applicant with less than these requirements. Finally, the Employer contended that each U.S. applicant questioned by the CO was not qualified for the position.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on September 11, 1995 (AF 15-17), denying certification because the Employer failed to document that the job requirements represent the actual minimum requirements for the job opportunity in accordance with § 656.21(b)(5). In addition, the CO found that the Employer failed to establish that all U.S. applicants were rejected solely for lawful, job-related reasons.

On October 13, 1995, the Employer requested review of the Denial of Labor Certification (AF 1-14). In March 1996, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for job similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio’s Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

However, in this case, the Employer has not required any **experience** in the duties of the job offered, listing only an educational requirement. Nevertheless, the Employer listed the job **duties** which included the statement, “Must be familiar with statistical analysis, inventory control, mathematics program and decision analysis” (AF 30). This statement was correctly treated by the CO and the Employer as if it were a job requirement. Therefore, we also treat this statement as as if it were listed in item 15 of ETA Form 750A as an “Other Special Requirement.” The job was classified as “Management Analyst” with an occupational code in the *Dictionary of Occupational Titles (DOT)* of 161.167.010. The duties for “Management Analyst” are:

161.167-010 MANAGEMENT ANALYST (profess. & kin.) alternate titles: systems analyst. Analyzes business or operating procedures to devise most efficient methods of accomplishing work: Plans study of work problems and procedures, such as organizational change, communications, information flow, integrated production methods, inventory control, or cost analysis. Gathers and organizes information on problem or procedures including present operating procedures. Analyzes data gathered, develops information and considers available solutions or alternate methods of proceeding. Organizes and documents findings of studies and prepares recommendations for implementation of new systems, procedures or organizational changes. Confers with personnel concerned to assure smooth functioning of newly implemented systems or procedure. May install new systems and train personnel in application. May conduct operational effectiveness reviews to ensure functional or project systems are applied and functioning as designed. May develop or update functional or operational manuals

outlining established methods of performing work in accordance with organizational policy. GOE: 05.01.06 STRENGTH: S GED: R5 M5 L5 SVP: 7 DLU: 89

We have compared the duties listed in the *DOT* with the duties listed for the job offered, and find that the Employer's statement that an applicant "Must be familiar with statistical analysis, inventory control, mathematics program and decision analysis," is not inconsistent with the duties for the position of Management Analyst. Therefore, we find that the requirement of familiarity with statistical analysis, inventory control, mathematics program and decision analysis is in compliance with § 656.21(b)(2). Further, because the Special Requirement is in compliance with § 656.21(b)(2), such cannot be considered to be unlawfully tailored the Alien's qualifications in violation of § 656.21(b)(5). Therefore, the CO's denial on this ground cannot be affirmed.

However, the CO also denied certification on the grounds that the Employer failed to document that U.S. applicants were rejected solely for lawful, job-related reasons in violation of § 656.21(j)(1) (see also § 656.21(b)(6)). The NOF instructed the Employer to submit rebuttal, including the lawful, job-related reasons for not hiring 4 applicants, Kevin Kubes, Jimmie, Lofton, Carl McCall, and Steven Green (AF 28). Employer's rebuttal states that none of these applicants were qualified, and referred to the results of interviews previously submitted to the state agency (AF 21). The results of interviews does address the rejections of each of these 4 applicants (AF 39).

As to Mr. Kubes, Mr. McCall, and Mr. Green, Employer states that they were rejected in part because none of them has any academic degree and none are familiar with statistical analysis, inventory control, mathematics program or decision analysis. Clearly, the lack of any academic degree is a lawful reason for their rejections as the requirement for the job included a Master's Degree in Operation Research or a related field.

As to Mr. Lofton, Employer states that he was rejected because he did not have a Master's Degree and was also not familiar with statistical analysis, inventory control, mathematics program or decision analysis. Mr. Lofton's resume indicates that he has attended college on 3 different occasions, receiving two degrees, an A.A. from East Los Angeles College (1967), a B.A. from Cal State University (1969) and that he attended Beverly College of Law (1971-1973), but does not indicate that a law degree was conferred (AF 49). Thus, there is no evidence that Mr. Lofton has a Master's Degree. Nevertheless, the CO cited § 656.24(b)(2)(ii) and found that the applicant could perform the basic job duties in a satisfactory manner through a combination of education/training/experience (AF 17).

The Board (per Judges De Gregorio, Glennon, Litt, and Williams) has previously held in a plurality opinion that a CO may not deny labor certification under § 656.24(b)(2)(ii) on grounds that a U.S. worker may meet a job's stated requirements through a combination of education, training, and experience where the job's requirements are unchallenged. The Board reasoned that, to hold otherwise, would "require an employer . . . to judge job applicants on the basis of all possible combinations of education, training, and/or experience that a CO might consider qualifying . . ." The Board then concluded that there is no requirement "for a CO substituting, after the fact, his/her own judgment for the Employer's job requirements, and then penalizing the Employer for having acted without regard to that judgment." *Bronx Medical and*

Dental Clinic, 90-INA-479 (Oct. 30, 1992)(*en banc*) (Judge Romano concurred to state that § 656.24(b)(2)(ii) does not set forth a separate standard except in regard to any work experience requirement. Judges Brenner, Groner, and Guill concurred in the result only and reasoned that the CO may challenge the rejection of U.S. workers under § 656.24(b)(2)(ii) but he or she has the burden of showing that the "U.S. applicant's qualifications . . . specifically compensate for the failure to meet the stated requirements and therefore enable the applicant to perform the employer's job." Judge Clarke dissented to state that the Act is intended to protect U.S. workers and the burden, therefore, should be placed on the employer to establish that each U.S. worker was rejected for lawful, job related reasons under 20 C.F.R. § 656.24(b)(2)(ii). *See also*, *Dearborn Public Schools*, 91-INA-222 (Dec. 7, 1993) (*en banc*); *Pryorson, Inc.*, 92-INA-384 (July 28, 1993); *St. Francis De Sales School*, 92-INA-284 (July 1, 1993); *Klaxton Enterprises*, 91-INA-180 (Nov. 24, 1992); *Princeton Information, Ltd.*, 91-INA-116 (Nov. 24, 1992); *Plastikon Industries*, 91-INA-169 (Nov. 5, 1992); *American Telephone & Telephone Co.*, 91-INA-225 (Nov. 5, 1992); *International Multifood, Inc.*, 91-INA-165 (Oct. 30, 1992).

Here, it is clear that the CO did not challenge the educational requirement. Thus, under the holding in *Bronx Medical*, the CO is prohibited from substituting, after the fact, his own judgment for the Employer's job requirements, and then penalizing the Employer for having acted without regard to that judgment. Therefore, we find that the CO's denial of labor certification cannot be affirmed on the basis of Employer's rejection of any of the 4 named applicants.

Accordingly, the CO's denial of labor certification cannot be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**, and this matter is **REMANDED** for issuance of labor certification.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

***Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

